92-763

(1)

No.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, MIKE SHARP, AND DAN BULISHAK,.....*Petitioners,*

versus

JOHN W. HUTCHINSON, ...*Respondent.*

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

I. Can an unchallenged judgment that law enforcement officers acted reasonably and did not use excessive force to effect a lawful arrest preclude a finding that the arrestee's Constitutional or civil rights were violated under 42 U.S.C. §1983?

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No._____

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1992

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, MIKE SHARP, AND DAN BULISHAK *Petitioners,*

v.

JOHN W. HUTCHINSON, *Respondent*[1]

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

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---

[1] There are no parent companies or subsidiaries involved in this action.

OPINIONS BELOW

The judgment of the Fayette Circuit Court (Appendix 12-14), the opinion of the Kentucky Court of Appeals (A.2-10), and the order denying discretionary review of the Kentucky Supreme Court (A.1) have not been officially reported.

JURISDICTION

The jurisdiction of this court is proper under 28 U.S.C. § 1257. The judgment sought to be reviewed was rendered by the Kentucky Court of Appeals on November 1, 1991 (A.5). Petition for rehearing was denied on January 24, 1992 (A.2). The Kentucky Supreme Court denied discretionary review on June 17, 1992 (A.1); less than 90 days have elapsed from that time. The issue on appeal to this Court was raised at trial level (A.25-32), at the Kentucky Court of Appeals (A.22) and on motion for discretionary review at the Kentucky Supreme Court and is adequately preserved for review by this Court.

STATUTORY PROVISIONS INVOLVED

The Constitutional provisions relevant to the issues of this case are U.S. Const. am. 4 and 14, and are set forth in full:

> Am. 4, cl. 1: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .
>
> Am. 14, sec. 1, cl. 2-4: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute relevant to this case if 42 U.S.C. § 1983, "Civil action for deprivation of rights," set forth in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

Petitioners, Lexington-Fayette Urban County Government ("LFUCG"), Officer Dan Bulishak ("Bulishak"), and Officer Michael Sharp ("Sharp"), were accused by the Respondent, John W. Hutchinson ("Hutchinson"), of using excessive force in lawfully arresting him and for violation of his Constitutional rights under 42 U.S.C. § 1983 in connection with the arrest.[2] The facts under which this action arose are that the Respondent was arrested for careless driving pursuant to KRS 189.290. Prior to his arrest, the Respondent refused to identify himself to Officers Bulishak and Sharp. The Respondent was tried on the traffic charge and found guilty of careless driving, thereby making the arrest lawful under Kentucky Revised Statute 431.015. Said traffic conviction was appealed to the Fayette Circuit Court which affirmed. The Respondent did not raise any constitutional challenges during the trial and appeal of this traffic citation. The Respondent then filed this civil claim against LFUCG, Bulishak and Sharp seeking recovery under state com-

[2] Respondent Hutchinson was convicted of the charge of careless driving which precipitated his arrest and which gave rise to Hutchinson's claim that the officers violated his civil rights. Commonwealth of Kentucky v. Hutchinson, No. 84-X-019. No constitutional challenges were made during these proceedings.

mon law and 42 U.S.C. § 1983. LFUCG was granted summary judgment and ordered dismissed from the action (A.11).

After trial on the merits, the trial court instructed the jury to determine whether the officers had acted reasonably under a Fourth Amendment standard. The jury returned a verdict in favor of both officers, so the jury did not consider additional instructions on damages, including an instruction on punitive damages. (A.15-21). The trial judge took notice that the only difference in remedy under the two theories of recovery (state common law vs. § 1983) espoused by the Respondent was the award of attorney fees. (A.22). The trial court entered judgment on the jury's verdict. (A.12-14). After entry of the jury verdict and judgment, the Respondent did not submit a motion for a new trial. Respondent appealed to the Kentucky Court of Appeals, but failed to challenge the jury's verdict that the officers had acted reasonably and did not use excessive force to effect the lawful arrest of the Respondent.

The Kentucky Court of Appeals upheld the dismissal of LFUCG, and did not disturb the finding by the jury that the Officers had acted reasonably and did not use excessive force. But the court did hold that the Respondent was entitled to a separate instruction on his § 1983 claim, treating Hutchinson's claim that he was subjected to "summary punishment" as a separate, substantive violation. On appeal, the only fact alleged by the Respondent in support of this notion is a notation on the arrest report that Hutchinson "fought officers/refused to show driv. lic." (A.23); Respondent urges that this notation is sufficient to support a claim for relief under § 1983 as a separate substantive cause of action in his Brief to the Kentucky Court of Appeals. (A.24) The Kentucky Supreme Court denied discretionary review. Petitioner now seeks to have the decision of the Kentucky Court of Appeals vacated, reinstating the judgment of the Fayette Circuit Court.

SUMMARY OF ARGUMENT

This case proceeded to a jury trial against two law enforcement officers and an urban-county government alleging that the officers used excessive force (state common law assault), and inflicted "summary punishment" upon the plaintiff by making a factual notation on the form citing the Respondent for "careless driving." The latter act is alleged to have been a violation of the Respondent's civil rights. The trial court granted LFUCG summary judgment dismissing it from the action. After a full trial on the merits, the jury returned a verdict in favor of both law enforcement officers, finding that the officers had used reasonable force under the circumstances.

Since § 1983 creates no separate substantive rights, any claim under § 1983 requires proof of an underlying deprivation of the rights of the individual. Here the officers were found to have acted reasonably: The force, if any, used by the officers were found by a unanimous jury to be no greater than was necessary, and the Respondent was later convicted of the offense for which he was arrested. The Respondent cannot, as a matter of law, make out a violation of his civil rights. The error alleged by the Respondent in his state appeal was that he was entitled to a separate jury instruction on the § 1983 claim which would, arguably, allow a jury to award damages for the violation of his civil rights. The judgment that the officers acted reasonably has never been attacked by the plaintiff, and cannot now be raised on this appeal.

The Kentucky Court of Appeals, in a split decision, erred by agreeing with the plaintiff, and Petitioner urges reversal of that court's decision ordering a new trial on plaintiff's § 1983 claim. If the jury has returned a verdict finding that the officers used *un*reasonable force, the trial judge had assured the Respondent that attorney fees would be awarded. In the judgment of the trial judge, this was the only difference in the remedy afforded by § 1983. Since the uncontroverted fact is that the jury did not find that the arresting officers used unreasonable force, the question of appropriate damages did not, and should not now, be raised, and this Court should order the decision of the Kentucky Court of Appeals vacated.

ARGUMENT

I. 42 U.S.C. § 1983 DOES NOT CREATE ANY SUBSTANTIVE RIGHTS, AND HUTCHINSON FAILED TO IDENTIFY OR PROVE AN UNDERLYING VIOLATION OF HIS CONSTITUTIONAL OR STATUTORY RIGHTS.

A cause of action under 42 U.S.C. § 1983 requires that the plaintiff show that there was a deprivation of his rights, privileges, or immunities secured by the Constitution or other laws. This is because § 1983 confers no substantive rights. *See, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979); *see also, United States v. Kozminski*, 487 U.S. 931, 941, 108 S.Ct. 2751, 2759, 101 L.Ed.2d 788 (1988); *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Screws v. United States*, 487 U.S. 91, 102, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495 (1945).

The Civil Rights Act of 1871 was intended to extend the limitations placed on the States by the 14th Amendment of the U.S. Constitution to individuals. *See, Wilson v. Garcia*, 471 U.S. 261, 276-77 (1985). An individual who is harmed by either a state, federal, or municipal official or by a private person would have recourse to the courts to seek redress for that harm. It is not disputed that the state courts have jurisdiction to entertain claims under 42 U.S.C. § 1983. *See, Monroe v. Pape*, 365 U.S. 167 (1961). What is at issue is whether the elements of a § 1983 claim, which necessarily include proof of some instance of wrongdoing on the part of the alleged offender, can be sustained when the alleged offender is adjudged to have acted reasonably.

Critical to the analysis here is the failure of the Respondent to define the elements of an alternative substantive basis for recovery. Judgment for the Petitioners that they used reasonable force necessitates that Respondent now provide this framework, which the Kentucky Court of Appeals assumed existed. The only act of the Petitioners that the Respondent has identified as providing some actionable basis is a notation on the "Uniform Citation" form that the Respondent "fought of-

ficers/refused to show driv. lic." (A-23). The Petitioners observed Hutchinson commit a traffic offense. They followed him for a distance continuing their observation of his vehicle and his driving. When Hutchinson pulled his vehicle into his driveway, Officers Sharp and Bulishak proceeded to ask Hutchinson to identify himself, but Hutchinson refused to do so. The Respondent, Hutchinson, was belligerent and uncooperative. The statement on the Uniform Citation is factually accurate, particularly as qualified by the language of "refused to show drv. lic." It is not, and has not been, disputed that this refusal was reasonable or justified. The jury obviously believed that Respondent did not act reasonably, since their verdict unanimously exonerated the officers.

The language used on the citation, "fought officers/refused to show drv. lic.," in the absence of a showing of unreasonable force on the part of the arresting officers, is unsufficient to support a separate cause of action under 42 U.S.C. § 1983. The decision of the Kentucky Court of Appeals was, as a matter of fact and law, clearly erroneous, and should be vacated.

II. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT ACCURATELY STATED THE ELEMENTS REQUIRED TO PROVE EITHER A STATUTORY OR A CONSTITUTIONAL VIOLATION OF RESPONDENT'S RIGHTS UNDER 42 U.S.C. § 1983.

A claimed violation of a person's civil rights in a pre-arrest context are appropriately analyzed under a Fourth Amendment standard.*Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1985, 104 L.Ed.2d 443 (1989). This standard looks to the reasonableness of a person's (police officer's) actions. This Court, in *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1964, 1699, 85 L.Ed.2d 1 (1985), restated the issue as one of seizure of a person (citing *United States v. Brignono-Ponce,* 422 U.S. 873, 878 (1975). The Court then identified the established standard of analysis for seizures of a person, which balances the extent of the intrusion against the need for the seizure. The Court stated:

> To determine the constitutionality of a seizure "[we] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983); *see Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976). We have described "the balance of competing interests" as "the key principle of the Fourth Amendment." *Michigan v. Summers*, 452 U.S. 692, 700, n. 12 (1981)....Because one of the factors is the extent of the intrusion, it is plain that *reasonableness* depends on not only when a seizure is made, but also how it is carried out. *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968). (Emphasis added.)

Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). This standard was accurately reflected in the instructions submitted to the jury at the close of the trial in this case. The instructions directed the jurors to determine whether, *under all the circumstances*, the officers acted reasonably in effecting the arrest of the Respondent, and allowed also for a finding that the officers' actions were unreasonable. A finding of unreasonableness is essential to a finding that the Respondent's rights, either statutory or constitutional, were impinged upon. Jury instructions tendered by Respondent (as plaintiff) at trial *also* required the jury to find that the Petitioner acted unreasonably, by using language such as "unlawfully," by requiring a finding that the officers assaulted the plaintiff, or requiring a finding that the plaintiff was subjected to the undefined "infliction of summary punishment." (A.25-32).

The Respondent urged the Kentucky Court of Appeals to adopt an improper Fourteenth Amendment Due Process analysis, which this Court has held is inappropriate in a pre-arrest context. *Graham v. Connor*, 490 U.S. 386. The Kentucky Court of Appeals erred in using a Fourteenth Amendment substantive due process analysis, then compounded its error by ordering the trial court to apply this incorrect statement of the

law to the present case.[1] The effect is to impose upon the trial court a standard which has been held unconstitutional by this Court. *See, Graham v. Connor, Id.*, These same factors were expressly rejected by this Court in *Graham v. Connor:*

> Because petitioner's [ ] claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree...[T]he fact remains that the "malicious and sadistic" factor puts in issue the subjective motivation of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.

Id., 490 U.S. 386, 397. The authority cited by the Kentucky Court of Appeals in support of its decision to order a retrial on the Respondent's civil rights claims, *Wilson v. Jackson*, 505 A.2d 913 (1986), was decided three years prior to this Court's holding in *Graham v. Connor* and is thus impliedly overruled as a result of that decision. The Kentucky Court of Appeals fails to perceive that, even after application of these constitutionally impermissible factors, Hutchinson still could not revover. The Kentucky Court of Appeals has clearly erred as a matter of law by relying on authority that has been superseded by judgment of this Court.

---

[1] The Kentucky Court of Appeals stated:

"Generally speaking, an action under § 1983 wherein police officers are accused of mistreating a plaintiff, may include in the instructions the following considerations: 1) conduct of the officers which 'shocks the conscience,' particularly where such conduct was malicious or sadistic; 2) the need for application of force; 3) the relationship between the need and the amount of force actually used; 4) the extent of injury inflicted; and 5) whether force was applied in a good faith effort to effect the arrest. [Citations omitted.]

The instruction with which the jury was charged was accurate, complete and consistent with constitutional dictates, and should be upheld on this appeal. The Respondent has failed at every juncture to identify the elements of an alternative basis for recovery which is separate and distinct from the excessive force claim, leading to the sole conclusion that the Kentucky Court of Appeals erred in reversing the decision of the trial court. Therefore, the decision of the Kentucky Court of Appeals should be vacated, and the judgment of the trial court should be affirmed.

III. AFTER PROPER INSTRUCTION, THE JURY RETURNED UNANIMOUS VERDICTS IN FAVOR OF BOTH OFFICERS, FINDING THAT NEITHER OFFICER HAD USED UNREASONABLE FORCE TO EFFECT THE ARREST OF THE PLAINTIFF.

The Kentucky Court of Appeals stated that "this particular action was framed as one of deprivation of [Hutchinson's] right to be free from the infliction of summary punishment without due process of law." (A.8). As noted above, the statement incorrectly characterizes this case as one involving violations of Hutchinson's Fourteenth Amendment Due Process rights. Since the allegations of wrongdoing occurred during detention and arrest, it is well-settled that a Fourth Amendment analysis is required. *Graham v. Connor,* 490 U.S. 386 (1989).

The trial court, on the other hand, properly instructed the jury under a Fourth Amendment reasonableness standard. (A.17). The instructions given to the jury, taken as a whole, direct the jury to undertake an analysis appropriately directed at whether the actions of Sharp and Bulishak were objectively reasonable under the circumstances. After considering all of the testimony presented to it by both parties, the jury found that Officers Sharp and Bulishak used only such "force *or means* as would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest" of Hutchinson, and they were therefore not liable in damages. [Emphasis added]. The simple jury instructions contained all

the elements necessary under a Fourth Amendment analysis including the nature of the respective party's interests, *United States v. Place,* 462 U.S. 696 (1983), and requiring the jury to judge the reasonableness of any force from the perspective of the officer on the scene, *Graham v. Connor,* 490 U.S. 386, 396 (1989); *Terry v. Ohio,* 392 U.S. 1, 22-27 (1968). The jury heard testimony from the officers, Sharp and Bulishak, Dr. Hutchinson, Mrs. Hutchinson, and others as to the events surrounding the arrest of Hutchinson. It considered all of this in returning a verdict for the officers.

The Kentucky Court of Appeals held that Hutchinson was entitled to a separate instruction on his § 1983 claim, but it failed to identify any possible wrong that the officers might have perpetrated upon Hutchinson that could overcome the jury finding that the Officers Sharp and Bulishak acted reasonably with regard to Hutchinson's arrest. Additionally, the decision of the Kentucky Court of Appeals was, unlike that of the jury verdict, not unanimous. A three-judge panel split 2-1 to remand the case for trial on the civil rights issue. Judge Dyche stated in his dissent:

> I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appellant is based on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also required this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error . . . .

(A.4). The record is devoid of any guidance for this Court as to what Respondent means by "summary punishment or even what the Kentucky Court of Appeals meant by the term. "Summary punishment," from a constitutional perspective, is the infliction of sanctions or harm upon another without due process of law in derogation of a right of "justifiable expectation" of such a right. *See, Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) (state prisoner had no justifiable expectation that he would not be transferred unless found guilty

of misconduct); *Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (state prisoners had no civil right to early release; sole remedy was writ of habeas corpus). In a Fourth Amendment context, it defies logic to try to understand how Hutchinson received "summary punishment," dispensed by Sharp and Bulishak, when the jury found that the officers' actions were reasonable. Hutchinson failed to make any constitional challenges during the trial on the traffic citation, where he was found guilty, and he was unable to make any specific challenges during the trial of the civil claims.

Because the jury instructions were clear and unambiguous, and were in accord with the constitutional analysis directed by this Court, the decision of the Kentucky Court of Appeals should be vacated.

IV. BECAUSE OFFICERS SHARP AND BULISHAK ACTED REASONABLY, AND DID NOT USE UNREASONABLE FORCE OR MEANS TO EFFECT THE LAWFUL ARREST OF THE RESPONDENT, THERE CAN BE NO VIOLATION OF RESPONDENT'S CIVIL RIGHTS.

The Respondent has failed to show a basis for recovery for violation of his civil rights that would justify retrial on the issue. The single alleged violation of Hutchinson's civil rights (as Respondent argued to the Kentucky Court of Appeals, A.25) was the notation that he had "fought officers/refused to show drv. lic." (A.24). As a threshold matter, it is difficult, if not impossible, to distinguish this act from all the others that surrounded the arrest of the Respondent. A citation is not punishment, an arrest is not punishment, a conviction is not punishment, and standing trial on the merits is not punishment. Hutchinson's Due Process rights were also protected, he received not one but two trials: 1) on traffic citation and 2) on civil claims.

"Punishment" is defined as "the act of punishing: the infliction of a penalty." *Webster's Third New International Dictionary (Unabridged),* (1981). There was no penalty inflicted on Hutchinson. Officers Bulishak and Sharp did not attempt to

punish Hutchinson in any way. They adhered to department policy.

It bears reiteration at this point that no liability was imposed on the employer of the officers, Lexington-Fayette Urban County Government. As a practical matter, under the facts and law relevant to this case, Sharp and Bulishak could not, and did not, violate Hutchinson's civil rights.

V. ALLOWING A CAUSE OF ACTION FOR VIOLATION OF AN ARRESTEE'S CIVIL RIGHTS WHEN REASONABLE FORCE IS USED BY THE ARRESTING OFFICERS WILL EFFECTIVELY DEPRIVE THE STATE OF THE MEANS TO EFFECT A LAWFUL ARREST.

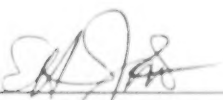
Allowing Hutchinson to pursue a claim against the two officers involved here, after a unanimous jury found that the officers acted reasonably in arresting him (which verdict was not challenged by Hutchinson),would be contrary to the express intention of the legislature. *See* Cong. Globe, 42d Cong., 1st Sess., 568 (1971). It was perceived by the legislators that a *procedure* was needed to provide persons who had been deprived of their civil rights access to the courts. This right to access has been balanced time and again against the traditional state interest in the public safety of its citizens. This Court stated in *Graham v. Connor,* "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat there of to effect. *See Terry v. Ohio* [citation omitted]." *Id., 490 U.S. 386, 396.*

The Kentucky Court of Appeals effectively held that law enforcement can no longer use *any* force, lest the officers risk lawsuits like the one before this Court now. If making a lawful arrest (evidenced by a subsequent conviction) and the completion of a required report form pursuant to appropriate department policies and procedures carries with it the attendant risk of civil action for money damages against the arresting officer, it will not be long before law enforcement officers decide that the risk outweighs the benefit.

CONCLUSION

For the foregoing reasons, the judgment of the Kentucky Court of Appeals should be vacated, reinstating the judgment of the Fayette Circuit Court.

Respectfully submitted,



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Supreme Court of Kentucky

92-SC-118-D
(88-CA-2649)

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, MIKE SHARP
AND DAN BULISHAK *Movants*

V. FAYETTE CIRCUIT COURT
85-CI-642

JOHN W. HUTCHINSON *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 17, 1992.

Robert F. Stephens

Chief Justice

Commonwealth Of Kentucky
Court Of Appeals

88-CA-2649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

ORDER DENYING PETITION FOR REHEARING
AND MODIFYING OPINION

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

The Court, having considered the Petition for Rehearing or, in the Alternative, for Modification or Extension, and being sufficiently advised, it is ORDERED that the same is hereby DENIED. Further, the Court, on its own, modifies pages 1 and 6 of its opinion rendered November 1, 1991, and substitutes new pages 1 and 6 therefor.

ENTERED: January 24, 1992

JUDGE, COURT OF APPEALS

Commonwealth Of Kentucky
Court Of Appeals

88-CA-002649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
CASE NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

AFFIRMING IN PART AND REVERSING IN PART

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

STUMBO, JUDGE. This is an appeal from a jury trial in the Fayette Circuit Court. Appeallant's suit was grounded in both tort and civil rights violations and arose from an altercation

DYCHE, JUDGE, DISSENTING IN PART. I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appeallant is barred on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also required this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error, or at worst harmless error to refuse to add instructions more fully setting out the alleged cause of action.

ATTORNEYS FOR APPELLANT:

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SHARP and BULISHAK:

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COUNTY GOVERNMENT:

Edward W. Gardner
Lexington, KY

(As Modified: January 24, 1992)

Commonwealth Of Kentucky
Court Of Appeals

88-CA-002649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
CASE NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

RENDERED: November 1, 1991; 10:00 a.m.

AFFIRMING IN PART AND REVERSING IN PART

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

STUMBO, JUDGE. This is an appeal from a jury trial in the Fayette Circuit Court. Appellant's suit was grounded in both tort and civil rights violations and arose from an altercation with two police officers employed by the Lexington-Fayette Urban County Government (hereinafter "LFUCG"). LFUCG was granted summary judgment and dismissed as sovereignly immune.

Appellant argues three issues on appeal, to wit: 1) whether sovereign immunity bars liability for intentional as well as

negligent acts; 2) whether the court erred in failing to grant his motion for directed verdict against the individual officers; and 3) whether the trial court erred in refusing to instruct on appellant's 42 USC 1983 claim? We affirm on the first two issues and reverse on last.

The appellant, John W. Hutchinson, was a professor at the University of Kentucky. On March 7, 1984, he had taught a night class, had returned books to a collegaue, and had eaten dinner. While returning home at 10:00 p.m., he allegedly swerved in front of an unmarked police car. The police followed the appellant for about a mile without turning on the blue lights. As the appellant's van neared a driveway, the appellant turned off his lights and pulled into the driveway. At this point, the police turned on their blue lights.

The two officers, dressed in street clothes and carrying large flashlights, approached the appellant and identified themselves as the police. The appeallant stated that he lived there and requested identification. He was then shown police identification and badges; however, appellant claimed the identification was false because the signature on them was that of the police chief from two years earlier. Although denied by appellant, the police claimed he started to walk away. At this point, the police grabbed him and placed him under arrest. Appellant was later convicted of reckless driving. Throughout this time, the appellant refused to identify himself and was very belligerent.

Uniformed officers later appeared on the scene, as did the EMT's. The appellant continually refused to identify himself until a police lieutenant, who appellant personally knew, arrived. Appellant claims that, prior to the arrival of the other officers and the EMT's, he was beaten by the appellees. There was very little evidence presented at trial to support this, including testimony by witnesses and physicians.

During trial appellant offered no proof of any possible liability of LFUCG other than the fact that it was the employer of the officers involved in the arrest. Respondeat superior is not a basis upon which civil rights liability can be found. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Further, as found by

this Court in *Hempel v. Lexington-Fayette Urban County Government*, Ky. App., 641 S.W.2d 51 (1982), LFUCG is, like a county government, a subdivision of the state entitled to the protections of sovereign immunity. KRS 67A.060; *Cullinan v. Jefferson County*, Ky., 418 S.W.2d 407 (1967); *Moores v. Fayette County*, Ky., 418 S.W.2d 412 (1967).

The directed verdict motion made by appellant was properly overruled. CR 50.01; *Nugent v. Nugent's Executor*, Ky., 135 S.W.2d 877 (1940).

The real question before us is the failure of the trial court to instruct on appellant's 42 USC 1983 claim. There is no argument that a § 1983 action may be brought in the state courts. *Main v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Scott v. Campbell County Board of Education*, Ky. App., 618 S.W.2nd 589 (1981). A § 1983 action has been determined to be supplementary to the state remedy; but, there is no requirement that the state remedy be requested or sought. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). We must, therefore, examine whether the state tort action and the federal claim are indeed separate and distinct.

The trial court gave the following instructions upon which the verdict was rendered:

QUESTION NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means that would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO_____

QUESTION NO. 1(B)

Do you believe from the evidence that Officer Bulishak used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO_____

Appellant does not contest the sufficiency of these instructions as to his tort action. However, the trial court seemed to be under the impression that if the jury found for appellant on the above instruction, the court could then find for appellant on the civil rights claim and award damages.

Generally speaking, an action under § 1983, wherein police officers are accused of mistreating a plaintiff, may include in the instructions the following considerations: 1) conduct of the officers which "shocks the conscience," particularly where such conduct was malicious or sadistic; 2) the need for application of force; 3) the relationship between the need and the amount of force actually used; 4) the extent of injury inflicted; and 5) whether force was applied in a good faith effort to effectuate the arrest. *See, Davis v. Forrest,* 763 F.2nd 257 (8th Cir. 1985); *Greene v. City of New York,* 675 F.Supp. 110 (S.D. N.Y. 1987).

This particular action was framed as a deprivation of appellant's right to be free from the infliction of summary punishment without due process of law. The instructions given herein make absolutely no reference to appellant's § 1983 civil rights claims. As in *Wilson v. Jackson,* 505 A.2d 913 (1986), we must reverse the judgment as to the alleged § 1983 violation and remand for a new trial on that count because "[t]he instruction was deficient in its breadth in that it was confined to the common law and did not cover the law with respect to § 1983 civil rights violations." *Id.*, at 917.

HOWERTON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS IN PART.

DYCHE, JUDGE, DISSENTING IN PART. I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appellant is based on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also requried this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error, or at worst harmless error to add additional instructions more fully setting out the alleged cause of action.

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LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT:

Edward W. Gardner
Lexington, KY

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON *PLAINTIFF*

verses

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, ET AL. *DEFENDANTS*

SUMMARY JUDGMENT

November 16, 1988

This matter having come on before the Court on the Motion of the defendant, Lexington-Fayette Urban County Government, for its summary judgment, and the Court having reviewed the memorandum submitted by the defendant, in addition to having heard arguments of counsel on October 25, 1988, and the Court being otherwise sufficiently advised, it is hereby

ORDERED AND ADJUDGED that there are no genuine issues as to any material fact and that the defendant, Lexington-Fayette Urban County Government, is entitled to a summary judgment and order of dismissal as a matter of law. Accordingly, the motion for summary judgment of the Lexington-Fayette Urban County Government is hereby sustained, and the plaintiff's Complaint against said defendant, Lexington-Fayette Urban County Government, is hereby dismissed, with prejudice.

/s/ James E. Keller

[s] JAMES E. KELLER
JUDGE, FAYETTE CIRCUIT COURT,
[True Copy]

FIRST DIVISION
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

By: J-L Deputy

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
85 CI 642

JOHN W. HUTCHINSON *PLAINTIFF*

versus

MIKE SHARP and DAN BUILSHAK *DEFENDANTS*

TRIAL, VERDICT AND JUDGMENT

November 9, 1988

Parties appeared this 25th day of October, 1988 and the jury empaneled herein met pursuant to adjournment.

The trial progressed and being concluded the numbers of the thirteen jurors were placed in the jury box and number "771" William McFadden was withdrawn and he was dismissed as the thirteenth juror from further consideration of this action.

The jury retired and returned into Court the following verdict, to-wit:-

QUESTON NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means that would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ **NO** XX

As the verdict was unanimous Edward B. Cupolo signed the verdict as foreperson.

QUESTION NO. 1(B)

Do you believe from the evidence that Officer Bulishak used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO XX

As the verdict was not unanimous Edward B. Cupolo signed the verdict as foreperson.

WHEREFORE IT IS ADJUDGED BY THE COURT THAT THE PLAINTIFF take nothing by his complaint and that the complaint is hereby dismissed and the defendants recover of the plaintiff their costs herein expended.

JAMES E. KELLER, JUDGE
FIRST DIVISION

ATTESTED COPIES MAILED TO:

HON. DAN TAYLOR
1052 Bardstown Rd.
Louisville, Ky. 40504
ATTORNEY FOR PLAINTIFF

HON. ERNEST JONES
259 W. Short St.
Lexington, Ky. 40507
ATTORNEY FOR DEFENDANT

THIS 9 DAY OF NOVEMBER, 1988.

ROBERT M. TRUE, C.F.C.C.

BY Carol Pendergrass D.C.

DISTRIBUTION:

Hon. Daniel T. Taylor, III
1052 Bardstown Road
Louisville, KY 40204

Hon. Edward W. Gardner
Lexington-Fayette Urban
County Government
Law Department
200 East Main Street
Lexington, KY 40507

Hon. Ernest H. Jones, II
259 West Short Street
Lexington, KY 40507

CLERK'S SIGNATURE

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
85CI-642

JOHN W. HUTCHINSON — *PLAINTIFF*

versus

MIKE SHARP and DAN BULISHAK — *DEFENDANTS*

INSTRUCTIONS

GENERAL INSTRUCTIONS

(a) Immediately upon retiring to the jury room, you shall elect one of your number as foreperson.

(b) Nine or more of your number must agree in order to answer any of the questions or make any of the determinations required by these instructions. The nine or more who agree on one however, need not be the same jurors who agree upon another.

(c) If all twelve of you agree on all the answers to the questions and the determinations to which you are required to respond, the foreperson alone can sign for you.

(d) Each answer or response on which the verdict is not unanimous must be signed by the nine or more of you who agree.

DEFINITIONS

"Medical expenses," means expenses incurred for hospital services or for any other institution engaged in providing medical, nursing or related services, medical services, medicines and medical supplies, nursing services, physical therepy, psychological and psychiatric evaluation and/or counselling, x-rays, emergency vehicles transportation and chiropratic services.

"Maliciously," means the intentional doing of a wrongful act with an evil or unlawful motive or purpose.

"Fair market value," means the price that property will bring when offered for sale by one who desires to sell, but is not compelled to do so, and brought by one who desires to purchase but is not compelled to have it.

INSTRUCTION NO. 1

It was the duty of the defendants, Officers Mike Sharp and Dan Bulishak, in arresting the plaintiff, Dr. John W. Hutchinson, not to use more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff.

QUESTION NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

(Check One) Yes_____ No X

FOREPERSON
(IF UNANIMOUS)

MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

QUESTON NO. 1(B)

Do you believe from the evidence that Officer Bulishak used

more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

(Check One) Yes_____ No_✓_

FOREPERSON
(IF UNANIMOUS)

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_____
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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

If you answered "no" to both questions nos. 1(A) and 1(B), you will proceed no further and return to the Courtroom.

INSTRUCTION NO. 2

If you answered "yes" to either questions nos. 1(A) or 1(B), or both, you will now determine from the evidence and award the plaintiff a sum or sums of money that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence he sustained directly by reason of the excessive force used in his arrest.

(a) For reasonable medical or dental expenses he has incurred:

$_____

(Not to exceed $1,402.00)

(b) For mental and physical suffering including any such suffering he is reasonably certain to endure in the future:

$_____

(Not to exceed $150,000.00)

(c) The difference between the fair market value of his computer immediately before the arrest and its fair market value immediately thereafter:

$_____

(Not to exceed $1,500.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

INSTRUCTION NO. 3

If you answered "yes" to question no. 1(A) and if you believe from the evidence that Officer Sharp acted willfully or maliciously in the use of excessive force while effecting the arrest of the plaintiff, you may, in your discretion, award the plaintiff punitive damages to be assessed against Officer Sharp.

We do / do not (circle one) award the plaintiff punitive damages to be assessed against Officer Sharp in the sum of

$_____
(Not to exceed $10,000.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

INSTRUCTION NO. 4

If you answered "yes" to question no. 1(B) and if you believe from the evidence that Officer Bulishak acted willfully or maliciously in the use of excessive force while effecting the arrest of the plaintiff, you may, in your discretion, award the plaintiff punitive damages to be assessed against Officer Bulishak.

We do / do not (circle one) award the plaintiff punitive damages to be assessed against Officer Bulishak in the sum of

$_____

(Not to exceed $10,000.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

Appellant's apprehension continued to mount, as to whether his Civil Rights claims would even be considered by this jury, in view of the following position expresed by the Trial Court on the first day of trial on two separate occasions:

> By the Court:
> "The only difference I can see between a 1983 action and this action would be attorneys' fees."
> (TAPE: 22/1/33/VCR/080 A-1; OCT 24 88; 13:57:58)

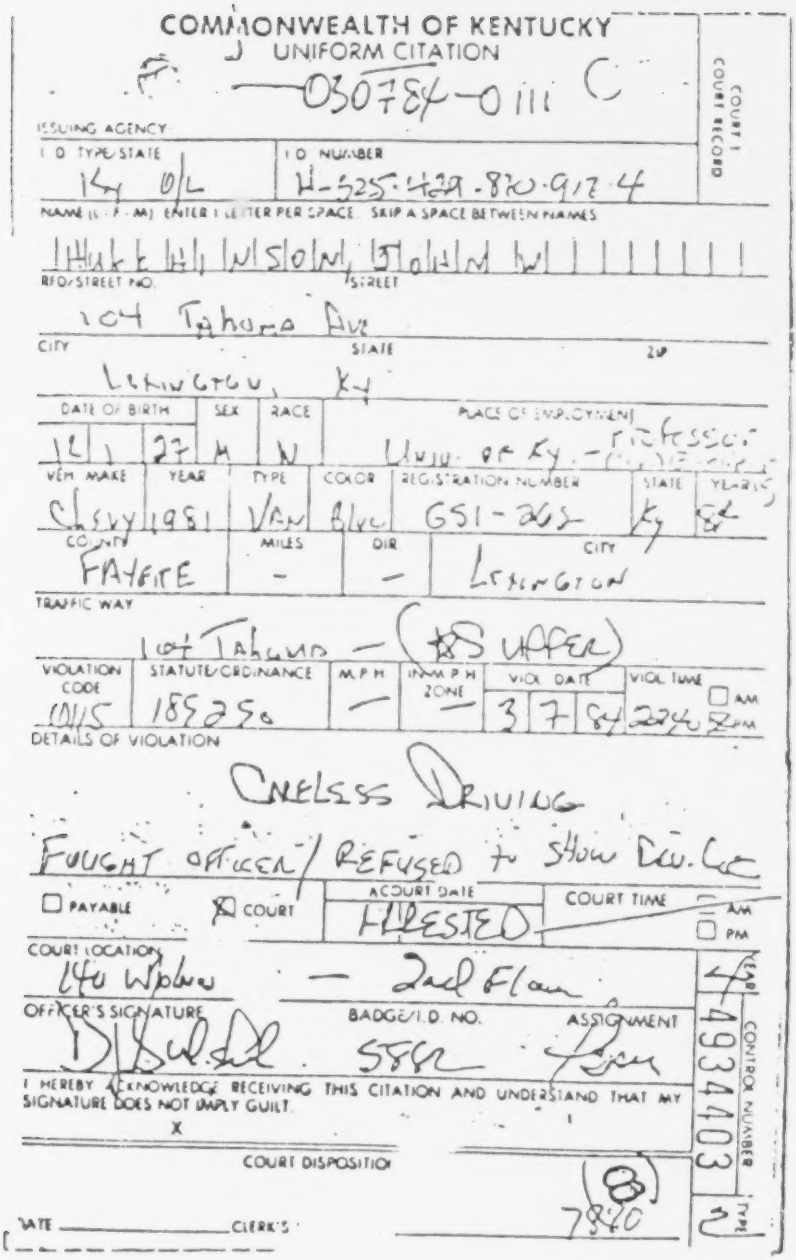
> By the Court:
> "The bottom line is the only difference between the tort remedy as provided in the State Statutes, or State common law, and the Civil Rights Act, is attorneys' fees."
> (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:44:33).

As the case continued Appellant's Counsel continued to urge the Constitutional issue sued upon. (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:42:07) (App. A-11).

However, even from the first day of trial it was evident that the Trial Court was not disposed to give sufficient instructions in this case, under the separate theories advanced. (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:46:15((App. A-12).

Nonetheless, throughout this trial, Appellant had diligently pressed his Constitutional claims. (TAPE: 22/1/88/VCR/080 A-2; OCT 25 88; 16:39:59)/(App. A-13) (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; (App.A-14) 16:45:32).

Though apparently in Appellant's favor, the next rulings by the Trial Court compounded this problem because in what was internally inconsistent and totally contradictory, it *overruled* the Defendants' Motion for directed verdict as to the §1983 Constitutionality claims, (TAPE: 22/1/88/VCR/080 A-2; 16:23:58) (App. A-15), and then turned right around and directly refused to accord Appellant any instructions whatsoever on his claimed Civil Rights violations under 42 U.S.C. 1983, particularly the due process provision in the Fourteenth Amendment.



COMMONWEALTH OF KENTUCKY
UNIFORM CITATION

030784-0111 C

COURT 1 COURT RECORD

ISSUING AGENCY

I.D. TYPE/STATE: Ky O/L
I.D. NUMBER: H-525-429-870-917-4

NAME (L - F - MI) ENTER 1 LETTER PER SPACE SKIP A SPACE BETWEEN NAMES

HUKE WILSON, JOHN W

RFD/STREET NO. 104 STREET Tahoma Ave

CITY LEXINGTON STATE Ky ZIP

DATE OF BIRTH 12/1/27 SEX M RACE W PLACE OF EMPLOYMENT Retired - Univ. of Ky.

VEH MAKE Chevy YEAR 1981 TYPE VAN COLOR Blue REGISTRATION NUMBER GS1-263 STATE Ky YEARS 84

COUNTY FAYETTE MILES - DIR - CITY LEXINGTON

TRAFFIC WAY 104 Tahoma - (85 Upper)

VIOLATION CODE 1015 STATUTE/ORDINANCE 189.290 M.P.H. - IN M.P.H. ZONE - VIOL. DATE 3/7/84 VIOL. TIME 2245 ☐ AM ☒ PM

DETAILS OF VIOLATION

Careless Driving
Fought officer / Refused to show Dr. Lic

☐ PAYABLE ☒ COURT ACCURT DATE ARRESTED COURT TIME ☐ AM ☐ PM

COURT LOCATION 140 W Main - 2nd Floor

OFFICER'S SIGNATURE D Sudduth BADGE/I.D. NO. 5882 ASSIGNMENT Traffic

I HEREBY ACKNOWLEDGE RECEIVING THIS CITATION AND UNDERSTAND THAT MY SIGNATURE DOES NOT IMPLY GUILT.
X

COURT DISPOSITION

DATE _____ CLERK'S _____

YEAR 84 CONTROL NUMBER 4934403 TYPE 2

(8) 7840

No. 8

BEST AVAILABLE COPY

In regard to these Instructions refused by the Court, the question may be asked, "what difference did it make?"

First, and particularly when, as was done here, each juror was given a set of the written Instructions, the absence of a Constitutional rights instruction lessened the Appellant's probability of prevailing on the other prong of his lawsuit.

Next, without this instruction, Appellant's rights under the Fourteenth Amendment, as was his parimary claim were reduced to an absolute nothingness. Additionally the same occurred as to the Fourth Sixth Amendment aspects of the case, and other elements in it. Is it not a basic right to be informed of the charge against one? *Did not the incorrect statement on the arrest slip ("fought officers") qualify as summary punishment, as its purpose was to damage Hutchinson further, and justify the setting of a high bond on him? [Emphasis added].*

But finally, and most importantly, a deeper consideration is involved here, and it is whether or not at this point in time the American people - awash in near-hysteria over crime, and inundated daily by television's bizarre and lopsided misrepresentations of legitimate police power - actually know whether there both should be and are limitations on same. After all, doors are kicked in, heads cracked, and Clint Eastwood intones "Make my day".

It must be urged that simplistic attitudes like this can make for a simple-minded electorate, the result being a society that becomes simply intolerable. Here was a case involving priceless "dignitary interests" that cried out for Instructions from the Court that one has the Constitutional right to be secure from summary punishment, but they were not given.

INSTRUCTON NO.

Even a person under arrest has certain liberties that cannot be taken from him, including the liberty to be free from unlawful attacks in his physical being. This Plaintiff, John Hutchinson, both before, during and after any arrests had the right under the Federal Consitituion not to be deprived of this remaining liberty without due process of law, and if it was done by these Defendants, you should award.

INSTRUCTION NO.

You as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and every manner and evidence which tends to show whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the stand. Consider the witness' ability to absorb the matters as to which he testified and whether he impressed you as having an accurate recollection of these matters. Consider also any relationship each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. Inconsistencies or discrepancies in the testimony of witness, or between the testimony of different witness, may or may not cause the jury to discredit that testimony. Two or more persons witnessing an incident or transaction may see or hear it differently, as the inconsistent misrecollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent/or from falsehood. After making your judgement you will give the testimony of each witness such credibility, if any, you may think it deserves.

INSTRUCTION NO.

The law provides that an individual has the right to remain silent when in the focus of an investigation and confronted by a police officer; it is not against the law to do so, indeed it is a basic right provided to all by the Consititution of the United States.

INSTRUCTION NO.

The burden in this case is upon the Plaintiff, Hutchinson, to prove its claim by a preponderance of the evidence in this case. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. In civil actions such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if after a consideration of all the evidence in the case, the jurors believe that what is sought to be proven on that issue is more likely true than not.

INSTRUCTION NO.

When two or more persons participate or cause in any way an assault upon the Plaintiff, John Hutchinson or other deprivations of his Constitutional rights, such as failure to keep him safe, or failure to provide necessary medical care, they incur a joint and several liability for the acts of each and all of the joint participants, and you must find for the Plaintiff against all of them who so acted. The law does not require the injured party to establish how much of the injury was done by one person and how much of the injury was done by another. Rather, it permits the injured party to treat all concerned in the injury jointly, and all are liable to the Plaintiff. All those who actively participate in a wrongful act, by cooperation or request, or who lend aid to encouragement to the wrongdoer, or who ratify or adopt the acts of a wrongdoer, or who knowingly fail to perform a duty to prevent a wrongful act, are equally liable to the victim of the wrongful act. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a tacit one.

If you find that one or more of the Defendants participated in or knowingly failed to act in accord with a duty to prevent a wrongful act by another, you must fine that Defendant or those Defendants liable, even if one or more of the wrongdoers is not a party to this lawsuit.

INSTRUCTION NO.

The Plaintiff, John Hutchinson, as does any person within the United States, has the right, guaranteed by the Constitution, to be free and safe from the infliction of summary punishment. This right of the Plaintiff, or anyone arrested, is not diminished or suspended in any way whatsoever, even due to belligerence, or noisiness, or so-called "non-cooperation" claimed by the police in the part of the person arrested, and you may not use same to justify the actions of the Defendants herein. The abridgment of this right is compensable in money damages, and if you find that this right of the Plaintiff was abridged in this case, you shall so find in damages for Plaintiff.

INSTRUCTION NO.

The testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case police officers you should not believe them merely because they are police officers. You should recall their demeanor on the stand, their manner of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including policemen, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

INSTRUCTION NO.

Section 1983 of Title 42 of the United States Code provides that any inhabitant of this Federal District may seek redress in this Court by way of damages against any person or persons who under color of law, statute, ordinance or regulation or custom, knowingly subjects such inhabitant to the deprivation of any right, privilege or immunity secured or protected by the Constitution or laws of the United States. The statute just outlined to you comprises one of the Civil Rights Acts enacted

by Congress under the 14th Amendment of the Constitution of the United Sates. The 14th Amendment to the Constitution of the United States provides that no State shall deprive any person of life, liberty or property without due process of law.

INSTRUCTION NO.

The fact that Plaintiffs' rights are found to have been violated in itself entitles him to actual damages which the law calls compensatory damages.

Therefore, if you decide for the Plaintiff, John Hutchinson, on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate him for any harm which the wrongful conduct of the Defendants was a substantial factor in bringing about. Among the elements of injury and harm which you say consider are:

1. The violation of his Constitutional right to liberty and to due process of law;

2. The reasonable expense of legal services required and received by the Plaintiff to defend and clear himself, if he was charged with a criminal offense;

3. The physical harm to the Plaintiff during and after the imprisonment, including ill health and physical pain or discomfort;

4. The emotional and mental harm to the Plaintiff during and after imprisonment, including fear, humiliation, and mental anguish;

5. The reasonable expense of medical or psychological care, treatment, and services required and received by the Plaintiff in connection with his physical and psychological injuries;

6. The extent and duration of the injuries, including their continuation in the future.

Whether each of these elements of damages has been proven by a preponderance of the evidence is for you to determine.

INSTRUCTION NO.

You may also award Plaintiff, John Hutchinson, punitive damages against the Defendants.

The function of punitive damages is to punish the defendant for malicious conduct and to deter similar conduct by others. Whether you decide to award any punitive damages should be based on whether you find that the Defendants have engaged in one of the following three things: (1) willfull or malicious violations of the Plaintiff's Constitutional rights; (2) intentional acts by the Defendants in gross disregard of the Plaintiff's Constitutional rights; (3) reckless disregard by the Defendants, whether or not they were violating the Plaintiff's rights.

If you find that they have done one of those things, then you should award punitive damages.

INSTRUCTION NO.

If you find that the Plaintiff, John Hutchinson, has been deprived of his Constitutional rights, you shall award damages to compensate him for the deprivation.

Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property.

Merely adding up medical bills or other expenses is not an adequate measure of how much compensation is appropriate.

In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance which this particular issue had for the Plaintiff, and the significance of the right in the context of the activities which Plaintiff was engaged in at the time of the violation of the right.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON *PLAINTIFF*

verses

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, et al. *DEFENDANTS*

SUPPLEMENTAL INSTRUCTIONS
TENDERED BY PLAINTIFF

Pursuant to Order of Court, Plaintiff tenders the attached Instruction, and respectfully reserves the right to supplement or amend same.

Served October 17, 1988, by personal service upon opposing Counsel; Hon. Edward W. Gardner, Department of Law, Lexington-Fayette Urban County Government Bldg., 200 W. Main St., Lexington, KY 40507; and Hon. Ernest H. Jones, II, Geralds, Moloney & Jones, 259 West Short Street, Lexington, KY 40507.

Daniel T. Taylor III
COUNSEL FOR PLAINTIFF
1052 Bardstown Road
Louisville, KY 40204
(502) 587-6097

INSTRUCTION NO.

The fact that the Defendants Bulishak and Sharp, or either of them, either through ignorance or indifference, may have had no specific intent or purpose to deprive this Plaintiff of his Civil Rights will not absolve that Defendant from liability if he did in fact deprive Plaintiff of his rights.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON — *PLAINTIFF*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, et al. — *DEFENDANTS*

FURTHER INSTRUCTION
TENDERED BY PLAINTIFF

If you find from the evidence in this case that the two Defendants applied excessive force in their arrest of the Plaintiff, then you shall find, and I instruct you as a matter of law, that this is a deprivation of due process of law as guaranteed to the Plaintiff by the Fourteenth Amendment, and you must award damages to Plaintiff in a reasonable and substantial amount to compensate him for same.

Respectfully tendered this October 25, 1988.

Daniel T. Taylor III
COUNSEL FOR PLAINTIFF
1052 Bardstown Road
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92-763

No. 92-763

Supreme Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and
DAN BULISHAK, - - - - - - Petitioners,

versus

JOHN W. HUTCHINSON, - - - Respondent.

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY, P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

1. Is a State Trial Court under a duty to instruct on the two separate claims when a civil Complaint alleges both common law tort violations, and a claim for violation of the Plaintiff's Constitutional rights under 42 U.S.C. § 1983?

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
MIKE SHARP, and
DAN BULISHAK, - - - - - - - - - *Petitioners,*

v.

JOHN W. HUTCHINSON, - - - - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case involves a civil Complaint brought by a college professor who was arrested and then assaulted by two policemen driving an unmarked car, dressed in casual street clothes, and without valid identification, for the purported offense of switching lanes in traffic.

Respondent sued in two theories: for the common law torts committed against him, and for the violation of his Constitutional right to be free from the infliction of summary punishment.

At the trial the Trial Judge was "non-acquainted" with the concept of concurrent jurisdiction or the lead cases in the area, stating at one point that it had not been decided

in Kentucky whether a Plaintiff could sue on his 42 U.S.C. § 1983 rights in the State forum (incorrect).

Respondent urged his Federal violation throughout the trial, and profferred precise Instructions as to same, but they were adamantly refused by the Trial Judge, who made the baffling remark that the only difference between the two separate claims in the case was the award of Attorney's fees.

Thus not adequately instructed, the jury returned a verdict for the policemen, which was immediately appealed by Respondent to the Kentucky Court of Appeals, which reversed on failure to instruct as proper, Discretionary Review then being denied by the Kentucky Supreme Court.

In their Statement of the Case, Petitioners herein (quite understandably) failed to apprize this Court that Respondent was in his own back yard, and was shown invalid identification by the police officers. Nor did Petitioners mention (once again quite understandably) that in addition to issuing a traffic citation, they knocked Petitioner unconscious, broke his glasses, destroyed his book bag, and occasioned the necessity for his further medical treatment.

SUMMARY OF ARGUMENT

As is of course quite apparent, the Complaint herein was sounded in two separate and distinct theories. The Civil Rights violations were clearly set out and pleaded in paragraphs 3, 4 and 5 of the Complaint.

It is simply beyond cavil that a party may sue for his/her Civil Rights violations in the State Courts: *Monroe* v. *Pape,* 365 U.S. 167 (1961); *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Maine* v. *Thiboutot,* 448 U.S. 1, 65 L.Ed. 2d 555, 100 S.Ct. 2502 (1980).

In view of the settled state of the law on this issue, the Kentucky Appellate Courts ruled entirely correctly in this case, additionally stating authority from their own venue: *Scott* v. *Campbell County Board of Education,* Ky. App., 618 S.W.2d 589 (1981).

To be totally precise, the substantive right here relied on by Respondent, and for which the Instruction was refused, is the guarantee contained in the due process clause of the Fourteenth Amendment of the United States Constitution to be free from the infliction of summary judgment, a premise involving state of mind, and altogether different from any common law torts incident thereto, and the determination of the latter by a jury is simply *not* dispositive of the former.

ARGUMENT

Petitioners' first contention is that Respondent *had* no Federal substantive rights in the premises, and/or that he failed to prove same.

Both positions are incorrect, under our Constitution, and well-settled law.

Petitioners' second contention is that the Instructions given adequately covered both claims.

This is a preposterous position, and at variance with what happened in this case. As the record repeatedly and totally portrays, the Trial Judge obstinately refused to give *any* Instruction whatsoever on the Constitutional violation urged by the then-Plaintiff, now-Respondent.

Thirdly, Petitioners rely on the jury verdict of no excessive force by the police officers.

That is *not* the true issue here, nor does it somehow "supplant" the required consideration of the Respondent's claim for infliction of summary punishment (again, "state of mind"). Further, it misses the point of what these officers *continued* to do to Respondent, after they had him under arrest (in his own back yard, for the heinous offense, as claimed, of switching traffic lanes; one does not need a Third Eye to envisage the rage and hatred that must have been "officially" present at this point, nor to conclude the violence thereafter wreaked on Respondent, when he questioned the invalid identification papers).

For a fourth argument, Petitioners would urge that the jury's finding that the arrest was lawful totally abnegates any claim Respondent may have had for the infliction of summary punishment he endured during and after same.

Again, Petitioners are totally incorrect, as was the Trial Judge, in failing to distinguish the two entirely different claims asserted by Respondent in his suit against these two policemen.

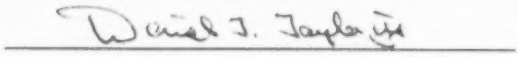
Ending with a whimper instead of a bang, Petitioners lastly aver that to allow a citizen to protest the infliction of summary punishment upon him will so derail our criminal justice system as to occasion societal breakdown.

The Respondent does not believe this innovative attitude requires rebuttal, among rational human beings.

CONCLUSION

Under the authorities, and the argument above set out, the Respondent asks this Court to deny its Writ of Certiorari in this cause.

Respectfully submitted this February 26th, 1993.



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